No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC., a corporation,

Appellant.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYEA, doing business as Refrigerated Express Company,

Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

APPELLEE'S REPLY BRIEF

and

CROSS-APPELLANT'S OPENING BRIEF.

ROBERT W. WALKER,
LOUIS M. WELSH,
448 Santa Fe Building, Los Angeles 14,
Attorneys for Appellee and Cross-Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

RULES

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC., a corporation,

Appellant.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYEA, doing business as Refrigerated Express Company,

Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

Basis of Jurisdiction.

Appellant in its Opening Brief has set forth the bases of jurisdiction of the trial court and of this court. We adopt, as our own, appellant's statements concerning the bases of jurisdiction.

Statement of Facts.

Appellant in its Opening Brief has, in part, misstated the facts, and for that reason additional facts are set forth.

One thousand cartons of shrimp creole were shipped from Chicago, Illinois, to Los Angeles, California, pursuant to a straight bill of lading contract entered into between the shipper-appellant and the originating carrier, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company [Pltf. Exs. 1 and 5].

The railroad car (ERDX 2667) arrived in Los Angeles on schedule on April 9, 1946, at 3:40 a. m. [Tr. pp. 122, 124]. On April 9, 1946, notice of the arrival of the car was mailed to the consignee, Gouley Burcham & Co [Deft. Ex. B]. Jack Belyea, trucker and agent for the consignee, was notified by telephone of the arrival of the car on April 10, 1946 [Tr. p. 139].

On April 11, 1946, Jack Belyea broke the seals on the car door and opened the doors [Tr. pp. 69, 139]. Belyea testified that after opening the car door he saw 25 to 40 soft cases of shrimp creole in and around the doorway [Tr. pp. 75, 81]. Mr. Belyea then took the *air* temperatures in the car above the lading and below the lading. He did not take the commodity temperatures [Tr. p. 95]. Belyea examined the ice bunkers in the railroad car [Tr. p. 98]. He did not request the railroad to further ice the bunkers [Tr. p. 99]. Mr. Belyea did not have the shrimp creole examined in Los Angeles to determine whether or not it was fit for human consumption. No samples were submitted to any laboratory or to the United States Department of Agriculture [Tr. p. 101].

Belyea then delivered 450 cartons—not 550 as stated in Appellant's Brief, page 4—to Pic'N'Time Frozen Foods in

Los Angeles [Tr. pp. 74, 148, 149]. He delivered 100 cartons to Gaydens, Incorporated, in Los Angeles. Some soft cartons were included in the 100 cartons which Gaydens received [Tr. pp. 91, 103]. Appellant makes no claim for damage to the 550 cartons delivered at Los Angeles [Tr. p. 59]. The 450 cartons received by Pic'N'Time arrived undamaged, in good condition, and were sold to the public through regular trade channels [Tr. pp. 59-60, 150-151]. Appellant's statement on page 4 of its Brief that "the local merchant who was to receive 550 cartons endeavored to salvage what he was to receive" is grossly misleading.

Mr. Belyea stated that, in his opinion, none of the cartons in the refrigerator car (with the possible exception of 25 to 30 cases) would have been damaged if they had been put into a cold storage warehouse in Los Angeles [Tr. p. 82].

After the cartons of shrimp creole were delivered to the Los Angeles consignees, Mr. Belyea loaded his truck with all the remaining cartons in the railroad car [Tr. pp. 75, 77]. It took 40 to 45 minutes to load Belyea's refrigerator truck. During that time the doors of the railroad car were open [Tr. p. 99]. Belyea delivered 365 cartons in San Francisco, 50 cartons in Bakersfield, and some of the cartons, "a small amount," at Sacramento [Tr. p. 95]. Appellant makes no claim for damage to the cartons delivered at Sacramento.

Since 550 cartons were delivered in Los Angeles, 365 at San Francisco and 50 in Bakersfield, or a total of 965 cartons, it follows that 35 cartons of shrimp must have been delivered to consignees in Sacramento. Although appellant states that 35 cartons of shrimp were never removed from the railroad car (App. Br. pp. 5, 6, 8, 18

and 21), there is no support for this statement in the record. At page 75 of the Transcript, Mr. Belyea states:

> "The soft merchandise, that was apparently all gone, we left in the car. I would estimate there were somewhere between 25 and 40 cases. The 25 to 40 cases which we didn't touch at all we just left in the car *until the reefer arrived.*" (Italics supplied.)

At page 91 Mr. Belyea states:

> "* * * I did put some of the soft cartons in my car. *As to the rest of them,* Gaydens, Incorporated, got a few soft cartons in their 50-case shipment." (Italics supplied.)

In addition to the icing record indicated on pages 2 and 3 of Appellant's Opening Brief, the record discloses the following:

(1) When the railroad car arrived in Los Angeles at 3:40 a. m., April 9, 1946, the ice bunkers were 98% full of ice and the bunker vents and plugs were in [Tr. pp. 122, 128];

(2) On July 10th at 8 a. m. the bunkers were inspected and found to be 85% full of ice. At that time the car was at the Bay Street Team Track. The vents and plugs were in [Tr. pp. 122, 128];

(3) On April 11, 1946, the day the car was unloaded, the bunkers were 75% full of ice [Tr. pp. 141, 98].

Appellant states on page 3 of its Brief that Los Angeles is a regular icing station. Los Angeles is not a regular icing station on destination traffic, if the bunkers

are ¾ full of ice when the car arrives [Tr. pp. 125, 136; Deft. Ex. C, Rule No. 225]. If the consignee wishes to ice the car at destination prior to the time the ice falls below 75% of bunker capacity, then he can and must specifically order the railroad to do so [Tr. p. 135].

The record does not support appellant's statements at pages 3, 4 and 14 of its Brief that the temperature of the car upon arrival at Los Angeles should have been 5° or less.

Appellant states that the parties hereto stipulated that 415 cartons were damaged when they arrived at Bakersfield and San Francisco (App. Br. p. 9). Such is not the fact. Page 3 of Plaintiff's Exhibit 1, paragraph V, reads as follows:

> "The plaintiff has sustained the following loss: 365 cartons were found to be unfit for human consumption in San Francisco, California. 50 cartons were found to be unfit for human consumption in Bakersfield, California."

The stipulation does not indicate, nor was it intended to indicate, that the shrimps were found to be damaged upon arrival at Bakersfield and San Francisco. The testimony brought out at the trial indicates that 40 cases were soft upon arrival at *San Francisco.* The rest of the cases were hard, but the San Francisco consignee took a blanket exception on the whole lot, because 40 cases were visibly soft [Tr. pp. 85-86, 88].

ARGUMENT.

I.

Appellant Failed to Prove That More Than 25 to 40 Cases of Frozen Shrimp Creole Arrived at Los Angeles Damaged.

For the purposes of this Reply Brief it is unnecessary to discuss appellant's charge that this appellee was negligent. The only question raised on appellant's appeal is whether or not the court awarded sufficient damages.

In order to establish a *prima facie* case in an action involving damage to goods in transit, the plaintiff must prove that the merchandise was delivered to the carrier in good condition and received from the carrier *at destination* in a damaged condition. (*Ohio Galvanizing & Mfg. Co. v. Southern Pacific Co.,* 39 F. 2d 840 (C. C. A. 6, 1930), *cert. den.* 282 U. S. 879.)

Appellant first contends that the Conclusions of Law and Judgment are not supported by the Findings of Fact because the court found that 415 cartons of frozen shrimp were damaged, but awarded Judgment for only 40 cartons. Appellant has neglected to point out that only 25 to 40 cartons were found damaged at Los Angeles. The other damage was found at points distant from Los Angeles and at times unknown to this appellee.

To establish a case against the railroads, it is not sufficient for appellant to show that its merchandise was found to be damaged at Bakersfield and San Francisco, California. Appellant must prove that the merchandise was damaged at Los Angeles, the terminus of the rail shipment. (*Julius Klugman's & Sons v. Oceanic Steam Navigation Co.*, 42 F. 2d 461 (D. C. N. Y., 1930); *McCready et al. v. Holmes,* 15 Fed. Cas. No. 8,733 at p. 1347.)

The evidence introduced at the trial discloses the following:

(1) Appellee and its connecting carriers were obligated under the terms of the bill of lading contract to deliver the carload of shrimp creole to Los Angeles [Pltf. Ex. 5];

(2) 25 to 40 cases arrived in Los Angeles soft and partially defrosted [Tr. p. 75];

(3) No analysis of the shrimp creole was made at Los Angeles to determine whether or not it was fit for human consumption [Tr. p. 101];

(4) More than 500 cases delivered at Los Angeles were undamaged and were disposed of in the ordinary course of trade [Tr. pp. 59, 74, 148-149];

(5) No damage would have occurred to any of the cases (with the possible exception of 25 to 40 cases) if they had all been placed in cold storage in Los Angeles [Tr. pp. 75, 82];

(6) Refrigerator cars may arrive in good condition with the contents thereof thoroughly frozen and yet a few cases in and around the doorway may be soft and defrosted [Tr. p. 152];

(7) Some (probably 35) cases were delivered to consignees in Sacramento and no claim is registered by appellant for these cases [Tr. p. 95].

Thus, there is no proof of damage to more than 25 to 40 cases at Los Angeles; there is, however, affirmative proof that the carload was in good condition when it arrived in Los Angeles.

Mr. Belyea testified that he was operating as a common carrier by truck in the State of California and was authorized to so operate by the Interstate Commerce Com-

mission and the Public Utilities Commission of the State of California [Tr. pp. 90-91]. It is extremely unlikely that a man, well aware of his responsibilities to the public, would place 450 cartons of damaged shrimps into his truck to deliver them to points as far north of Los Angeles as San Francisco. The mere fact that Belyea accepted the 450 cartons is evidence that those cartons were in good condition when they arrived in Los Angeles.

In the case of *Julius Klugman's & Sons v. Oceanic Steam Navigation Co.,* 42 F. 2d 461 (D. C. N. Y., 1930), plaintiff brought an action to recover for the loss of furs transported from London to a warehouse in New York. The furs were shipped by sea from London to New York. They were unloaded from the ship at New York and placed upon a truck which transported them to the warehouse. One week after the furs had arrived at the warehouse they were inspected, and it was then discovered that some of the furs were missing from one of the packages. Plaintiff joined as defendants the navigation company, the trucking company and the warehouse. The court stated at page 462:

> "As for the [water] carrier, the most that can be said is that the loss might have occurred while the furs were in its custody. It is equally possible that the theft took place later, during the week while the furs were in the warehouse. The damage suffered by the plaintiff is undoubted, but as between carrier and warehouseman, there is no indication as to where the loss occurred. The burden of proof is on the plaintiff to show non-delivery by the carrier. It is not sufficient to prove a state of facts as consistent with the occurrence of the loss after delivery by the carrier as before delivery."

In *McCready et al. v. Holmes,* 15 Fed. Cas. No. 8,733 at page 1347, the court stated at page 1348:

> "And if it should be, that after the carrier had parted with his possession of the property, it has been in the possession and control of other agents of the consignee; the reason for exonerating the carrier increases in proportion to the number of such agents, the length of time for which they were in possession; and the opportunities they enjoyed to diminish the quantity for which the carrier was liable."

The court further states at page 1348:

> "But the consignee has not the right to accept a delivery of the goods, commit them to his agents, examine them without notice to the carrier, and charge the carrier with a loss alleged to have been thus subsequently ascertained, upon such proof as excludes all reasonable probability of the loss having happened except in the hands of the carrier."

The court states at page 1349:

> "The coal was carted, after it was landed, to some distance, and then weighed. The carts were under the control of the agents of the consignee. It is quite as reasonable to infer that the loss happened while the coal was under the care of the agents of the consignee, as while it was under the charge of the carrier."

And again the court states:

> "So in this case, the carrier has landed the coal: and at the wharf, made delivery of it to the consignee. The consignee intending to cart it elsewhere, and to weigh it, must do so at his own expense and risk. If loss or damage occurs in that transportation, the consignee must bear it.

> "* * * If the consignee, without notice or qualifying his acceptance, receive, as in this case, coal; commits it to his agents, in whose charge it may be lost, as well at least as while it was in the charge of the carrier; and rests the proof of loss by the carrier upon evidence which does not render it more probable that the loss was chargeable to the carrier, than to his own agents,—a case is presented in which I am not at liberty to make the carrier liable."

Appellant has set forth several arguments to support the proposition that all the damaged cartons were damaged when they arrived at Los Angeles. We shall discuss these arguments *seriatim.*

First: Appellant contends that since the broccoli and cauliflower in Belyea's truck arrived frozen in San Francisco it follows that no casualty occurred which could have damaged the shrimp (App. Br. p. 18). Appellant's evidence discloses that shrimp creole will defrost at temperatures upward of 20° to 25°, a temperature well below the freezing point of water [Tr. pp. 110-111]. There is, however, no evidence to indicate the freezing points for broccoli and cauliflower. If broccoli and cauliflower can be frozen at 32° F., then it is possible that the shrimp could have been damaged while in Belyea's truck, although the broccoli and cauliflower arrived on the same truck in a frozen condition.

The evidence introduced at the trial of this action disclosed that it took from 40 to 45 minutes to load Belyea's truck before it departed for points north [Tr. p. 99]; that

the lading was transported from Los Angeles to San Francisco via the San Joaquin Valley during the month of April; that portions of the contents of the truck were unloaded at Bakersfield and Sacramento and that the car doors were necessarily open during such unloading process; that the car arrived in San Francisco too late to make delivery and that the truck was then sent to San Jose where the truck doors were again opened so that additional dry ice could be inserted therein [Tr. p. 95]. Mr. Belyea testified that he did not know when the shrimps were actually deposited in the warehouse in San Francisco [Tr. p. 96]. This indicates that the damages sustained by appellant not only could have been, but undoubtedly were, incurred subsequent to the termination of the rail movement.

Second: Appellant, at page 15 of its Brief, stresses the testimony of Mr. Spoelstra and concludes therefrom that all the merchandise delivered in Los Angeles was damaged. Mr. Spoelstra testified that shrimps will defrost at temperatures upwards of 20° to 25° F. [Tr. pp. 110-111]. His testimony concerning the condition of shrimps was predicated upon the assumption that the shrimp itself was maintained at a temperature upwards of 20° to 25° F. Appellee objected to the hypothetical question put to Mr. Spoelstra on the ground that the evidence introduced at the trial did not indicate at what temperature the shrimps were found when the car arrived at Los Angeles [Tr. pp. 113-118]. The evidence was that the *air* temperatures in the car were 50° and 54° after the car doors had been opened. The mere exposure of frozen

shrimp to an air temperature of 50° or 54° will not damage the shrimps unless the exposure is for a sufficient length of time to effect the temperature of the frozen shrimps. There is no dispute concerning this. Plaintiff's witnesses freely admit it [Tr. pp. 55, 67, 94, 118, 126, 156]. Appellant's statement on page 16 of its Brief that "Mr. Dominis testified the shrimp was refrozen * * *" is not true [Tr. p. 150].

Third: Appellant further contends that since the trial court did not find defendant Belyea negligent, it follows that any damage that occurred to the shrimp existed at the time the railroad car arrived at Los Angeles.

The trial court found that defendant Belyea was not negligent because appellant failed to prove him negligent. It was appellant's duty, under the law, to prove its case against defendant Belyea. This it did not do, because Belyea was bankrupt. Appellant only retained Belyea as a nominal defendant so that it could examine him as if on cross-examination [Tr. p. 68].

Fourth: Appellant in its Brief at page 22 states:

> "The appellee introduced no evidence which in any way showed that the shrimp creole rejected in Bakersfield and San Francisco was undamaged, uncontaminated, or salable when it was delivered to appellant in Los Angeles."

Appellant has misconceived the burden of proof. It is appellant's duty to prove that the goods arrived in a damaged condition, not appellee's duty to prove that they arrived in good condition. (*Atlantic Coast Line R. Co. v. Enterprise Oil Co.,* 211 Ala. 676, 101 So. 605; *A. A. A. Highway Express, Inc., v. Bone & Hendrix,* 69 Ga. App. 763; 26 S. E. 2d 658.)

II.

The Findings of the Trial Court Will Be Upheld Upon Appeal Unless They Are "Clearly Erroneous."

There is substantial evidence to support the trial court's findings that only 40 cases of shrimp creole arrived at Los Angeles damaged [Tr. p. 28, Conclusions of Law No. 8].

In cases where a jury is waived the judgment of the trial court has the force and effect of the verdict of a jury, and the judgment will not be reversed where there is substantial evidence upon which to base it. (*Independence Indemnity Co. v. Sanderson,* 57 F. 2d 125 (C. C. A. 9, 1932); *Burkhard Investment Co. v. United States,* 100 F. 2d 642 (C. C. A. 9, 1938).) The trial court's findings are not to be disturbed on appeal unless they are clearly erroneous. (Rules of Civil Procedure for the District Courts, Rule 52(a), 28 U. S. C. A. following §723(c); *Occidental Life Ins. Co. v. Thomas,* 107 F. 2d 876 (C. C. A. 9, 1939); *United States v. Cushman,* 136 F. 2d 815 (C. C. A. 9, 1943); *Wittmayer et ux. v. United States,* 118 F. 2d 808 (C. C. A. 9, 1941).) In the *Wittmayer* case this court stated at page 811:

> "As was said by Mr. Justice Holmes in Adamson v. Gilliland * * * the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

The record in this case discloses that the trial court would have committed error had it found that more than 25 to 40 cases were damaged upon arrival in Los Angeles.

None of the cases of shrimp, including the 25 to 40 soft cases, were examined at Los Angeles to determine whether or not they were unfit for human consumption. All of the 550 cases delivered in Los Angeles by Belyea were in good condition.

Appellant's counsel admitted that

> "* * * 500 cases or 450 cases of this same shipment were good and were used in the ordinary course of trade." [Tr. p. 59.]

Conclusion.

It is respectfully submitted that (1) appellant failed to establish that more than 25 to 40 cases were damaged when the carload of shrimp creole arrived in Los Angeles; and (2) the evidence is such that this court should not hold that the Findings of the trial court are "clearly erroneous."

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellee and Cross-Appellant.

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC., a corporation,

Appellant.

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and JACK BELYEA, doing business as Refrigerated Express Company,

Appellee,

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

HAMILTON FOODS, INC., a corporation,

Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

Specification of Errors.

I.

The evidence of cross-appellant proved that it was not negligent in transporting cross-appellee's merchandise. Cross-appellee failed to affirmatively prove any act of negligence against cross-appellant. The trial court therefore erred in granting Judgment for cross-appellee.

II.

The trial court erred in applying the facts of this case, as it found them, to the law in that (a) the trial court did not find that cross-appellant was negligent; (b) Conclusions of Law Nos. 4, 5 and 7 specifically set forth that cross-appellant fulfilled its duty under the bill of lading contract and the tariffs on file with the Interstate Commerce Commission; (c) the Judgment for cross-appellee is therefore in conflict with the Findings of Fact and Conclusions of Law.

ARGUMENT.

I.

The Evidence Introduced at the Trial Disclosed That Cross-Appellant Was Not Negligent and the Burden of Going Forward With the Evidence Then Shifted to Cross-Appellee to Prove Affirmatively That This Cross-Appellant Was Negligent. Cross-Appellee Failed to Prove Any Affirmative Act of Negligence Against This Cross-Appellant and the Court Erred in Not Entering Judgment for Cross-Appellant and Against Cross-Appellee.

A rail carrier is not an insurer of perishable commodities entrusted to its care for transportation. In connection with the transportation of perishable commodities or merchandise which may spoil by virtue of its own inherent vice, a rail carrier has only the duty to exercise reasonable care under the circumstances; that is to remain free from negligence. After the shipper has made out a *prima facie* case of delivery in good condition and receipt in bad condition, the burden of going forward with the evidence shifts to the rail carrier to prove that it has been free from negligence. When the rail carrier has satisfied this require-

ment by producing its records which indicate that it has transported the commodities with due care, then it is incumbent upon the plaintiff to affirmatively prove negligence. Plaintiff's failure to produce such proof requires judgment for the defendant-rail carrier. (*Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 164 F. 2d 1 (C. C. A. 5, 1947).)

Perishable Protective Tariff No. 13, Rule 130, provides:

> "Condition of Perishable Goods Not Guaranteed by Carriers.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

Rule No. 135 provides:

> "Liability of Carriers.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived." [Deft. Ex. C.]

In the case at bar the rail carrier's evidence proved: 1) Frozen shrimp creole is a perishable commodity [Tr. pp. 119-120, 93]; (2) the seals attached to the car when

it arrived at Los Angeles were the same as those attached by the shipper at the point of origin. They were unbroken [Tr. pp. 63, 72]; (3) the railroad car (ERDX 2667) was in good condition and was the proper type of railroad car for the transportation of appellant's merchandise [Tr. pp. 62-63, 65, 72]; (4) when the railroad car arrived at Los Angeles the door of the car was in good condition [Tr. p. 72]; (5) the car arrived in Los Angeles on time with no delays [Pltf. Ex. 1, p. 2, par. III; Tr. p. 124]; (6) the consignee was promptly notified of the arrival of the car in Los Angeles [Tr. pp. 69, 139, Deft. Ex. B]; (7) the railroad's icing record proves that the car was regularly iced in conformance with the shipper's instructions and the tariffs on file with the Interstate Commerce Commission ["Exhibit A" attached to Pltf. Ex. 1; Tr. pp. 98, 141]; (8) after the car arrived in Los Angeles the ice in the bunkers was inspected daily; the ice never fell below 75% of bunker capacity [Tr. pp. 122, 128, 98, 141; Deft. Ex. C, Rule 225].

We therefore submit that the case at bar has been brought within the four corners of the doctrine enunciated in the *Atlantic Coast Lines* case, *supra*, page 17.

In that case the shipper brought an action against the carrier for damage to a shipment of beef in transit. The court stated at page 3:

> "With respect to the degree of care required of a carrier in the transporting or refrigeration of perishable goods, the shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U. S. C. A. Under §20 of that act. the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading, in accordance with published tariffs and regulations. [Citing cases.] * * *

"It is apparent that these rules limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper."

The court further states at page 4:

"Under the protective tariffs applicable in this case [Rules 130 and 135 of the Perishable Protective Tariff], the shipper must show that there was a lack of ordinary care on the part of the carrier, but proof *by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service.* Sutton v. Minneapolis & St. L. Ry. Co., 222 Minn. 233, 23 N. W. 2d 561; Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1274." (Italics supplied.)

In *Sutton v. Minneapolis & St. Louis R. Co.,* 222 Minn. 233, 23 N. W. 2d 561, the shipper brought an action to recover damages for damage to a carload of eggs shipped over defendant's railroad. A judgment for defendant *n.o.v.* was affirmed. At page 562 the court stated:

"The liability of a common carrier to the shipper of perishable products is based upon failure to exercise ordinary care in the preservation of such products while in the course of transportation. [Citing cases.] This rule is elaborated by the one that, if the shipper gives instructions as to the protective measures that shall be taken to preserve such products, compliance with such instructions is complete protection to the carrier against liability for loss. So. Pac. Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1268. No case to the contrary has been called to our attention. The rule is fundamentally just. Rule No. 135 of Perishable Protective Tariff No. 12, on file

> with and approved by the interstate commerce commission, is to the same effect. To make out a case against defendant, it must appear that the eggs were delivered to the original carrier in good condition and that their arrival at Minneapolis in bad condition was due to lack of ordinary care on the part of the carrier, *having in mind the rule that compliance with the shipper's instructions as to protective service is a complete defense against a charge of negligence in connection with such service.*" (Italics supplied.)

To the same effect see *Standard Hotel Supply Co. v. Penn. R. R. Co.,* 65 Fed. Supp. 439 (D. C. N. Y., 1945); *Shapiro v. Penn. R. R. Co.* (Court of Appeals for District of Columbia, 1936), 83 F. 2d 581; *Leonard v. Penn R. R. Co.,* 15 Fed. Supp. 55 (D. C. N. Y., 1936); *South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co.,* 46 F. 2d 452 (C. C. A. 4, 1931); *Southern Pacific Co. v. Itule,* 51 Ariz. 25, 74 P. 2d 38.

The law is not as cross-appellee has stated it. The carrier need not affirmatively prove the cause of the damage.

Hall v. Nashville & Chattanooga R. Co., 13 Wall. 367, 20 L. Ed. 594, cited by cross-appellee for the *dictum* that

> "* * * when a loss occurs, unless caused by the act of God, or of a public enemy, he [the carrier] is always at fault. * * *"

is not in point. That case was decided prior to the time that the present bill of lading and tariff provisions were approved by the Interstate Commerce Commission. The case merely states the original common law liability of a carrier. Cross-appellee cites *Crinella v. Northwestern Pacific* R. Co., 85 Cal. App. 440. In that case the icing

record of the railroad was faulty in at least two respects: (1) The car was not iced at all regular icing stations, and (2) the record showed that the car was iced at a station through which it never passed.

At page 8 of its Brief cross-appellee cites *Bronstein v. Baltimore & Ohio R. Co.*, 29 Fed. Supp. 837, for the proposition that:

> "The burden of proof is then on the carrier and he must prove that he was free from neglect and that the damage to the goods resulted either from an act of God, public enemy or the inherent nature of the goods themselves."

In the *Bronstein* case the court stated at page 838:

> "The commodity was inherently perishable, and if a method of loading was chosen which caused or contributed to the damage the strict rule of carrier's liability would not apply."

And at page 839:

> "Thus, the burden in these cases was upon the plaintiff to show carrier's negligence."

Such was the burden in the case at bar.

Although it was unnecessary for the rail carrier to affirmatively prove that the damage sustained by cross-appellee was due to "vice of the goods" or "act or default of the shipper," such evidence was brought out during the trial of the case. Plaintiff's witnesses testified that it is preferable to place stripping along the sides of a refrigerator car in order to promote the circulation of cold air [Tr. pp. 83-84, 106]. Stripping the car prevents the lading from touching the sides of the car and a column of cold air insulates the lading from the wall of the car upon which

the heat of the sun strikes [Tr. pp. 66, 82-83]. Thus, the damage to 25 to 40 cases may have been the result of cross-appellee's failure to properly strip the car.

Those cases cited by cross-appellee under Point III of its Brief are not relevant. This cross-appellant did not contend below, nor does it now contend, that its liability should be limited to that of a warehouseman.

Cross-appellant has no quarrel with the cases cited on page 23 of Appellant's Brief. The Federal cases are in accord.

Cross-appellee, Hamilton Foods, argues in its Opening Brief under Point II that the rail carriers were negligent in having failed to re-ice the car for 64 hours after it arrived in Los Angeles. The carrier is not only not required to re-ice a car at point of destination when the ice in the bunkers has not fallen below 75% of the bunker's capacity, but a rail carrier would be subject to a charge of discrimination in violation of the Interstate Commerce Act, if it did perform such service.

Rule 225 of the Perishable Protective Tariff No. 13 [Deft. Ex. C] provides in part as follows:

> "Cars placed on hold, inspection, or delivery tracks at * * * destination, with bunkers less than three-fourths full of ice, will be re-iced to capacity."

The shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U. S. C. A., §1 *et seq.* Under that Act the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading in accordance with the published tariffs and regulations. (*Standard Hotel Supply Co. v. Penn. R. R. Co.,* 65 Fed. Supp. 439 (D. C. N. Y.,

1945); *Atlantic Coast Line R. Co. v. Georgia Packing Co. et al.*, 165 F. 2d 169 (C. C. A. 5, 1947).) The published tariffs on file with the Interstate Commerce Commission governs the shipment of goods in interstate commerce, and the carrier must literally adhere to the dictates of the tariff. (*Boston & Maine R. Co. v. Hooker,* 233 U. S. 97, 58 L. Ed. 868.)

In *Chesapeake & Ohio R. Co. v. H. E. Martin,* 283 U. S. 209, 75 L. Ed. 983, the court stated at page 221 of the Official Court Report:

> "And it was distinctly held by this court in Georgia, F. & A. R. Co. v. Blish Mill. Co., *supra* (241 U. S. 197, 60 L. ed. 952, 36 S. Ct. 541), that the parties to a contract of interstate shipment by rail, made pursuant to the Interstate Commerce Act, could not waive its term 'Nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.'"

Mr. Mulvihill, Assistant Manager of the Santa Fe Refrigeration Department, testified that Los Angeles is *not* a regular icing station on cars destined to Los Angeles when the bunkers are ¾ full of ice [Tr. pp. 125, 136].

Under the law and the contract [Rules 130, 135 and 225 of the Perishable Protective Tariff] the rail carrier need only prove that it was free from negligence in transporting the perishable commodities from point of origin to point of destination. Such proof was presented to the

trial court and, as a matter of fact, the trial court found that:

> "* * * it would appear that the Railroad Company complied with the protective tariff regulations and with the Bill of Lading under which it was governed in delivery of the shipment to its track in Los Angeles." [Tr. p. 28, Conclusions of Law No. 7.]

II.

The Conclusions of Law and Judgment Are Not Supported by the Findings of Fact and Are in Conflict Therewith.

The appellate court, reviewing a judgment of the trial court sitting without a jury, has the power to reverse the trial court, if the latter's judgment is not supported by the findings of fact. (*Allen v. St. Louis National Bank,* 120 U. S. 20, 30 L. Ed. 573; *Jensma v. Sunlife Assurance Co. of Canada,* 64 F. 2d 457 (C. C. A. 9, 1933).)

In its opinion and in the Conclusions of Law, the trial court held that the duty imposed upon rail carriers while transporting perishable commodities is to exercise ordinary care under the circumstance [Tr. pp. 15, 27, Conclusion of Law No. 4]. The court found further that:

> "* * * the railroad company has complied with the tariff protective regulations and the bill of lading under which it was governed in delivering this shipment on its track here in Los Angeles." [Tr. pp. 16, 28, Conclusion of Law No. 7.]

Neither in the Findings of Fact nor in the Conclusions of Law does the court state that the railroad was negligent; nor does the court set forth facts from which it can be inferred that the railroad was negligent.

Finding of Fact No. 13 states "that Los Angeles is a regular icing station." This is true on some traffic, but the undisputed evidence shows that Los Angeles is not a regular icing station in those instances, as here, where it is the point of destination and the ice in the bunker has not fallen below 75% of capacity.

Conclusion of Law No. 5 [Tr. p. 27] is as follows:

> "That under the protective tariff applicable to shippers of perishable properties, the plaintiff must show that there was a lack of ordinary care on the part of the carrier as the carrier is not an insurer."

In its opinion the court stated:

> "The only negligence in this case was that 40 cases * * * arrived in a damaged condition." [Tr. p. 15.]

This statement of the court indicates that although it held that the railroad is not an insurer of perishable commodities, still in applying the law to the facts of this case, it tacitly assumed that the railroad is an insurer. The Conclusions of Law and Findings of Fact are in conflict with the Judgment. The Conclusions of Law and Findings of Fact support a judgment in favor of the defendant for the following reasons:

The Findings of Fact and Conclusions of Law point out (1) that the railroad is not an insurer, but must merely exercise ordinary care in the transportation of perishable commodities, and (2) that the railroad in this case did exercise that quantum of care which the law requires of it.

An appellate court will not search the record to find evidence to support the trial court's judgment where the trial court has failed to prepare findings of fact which

support its judgment. (*Kelley v. Everglades Drainage District,* 319 U. S. 415, 87 L. Ed. 1485.) A search of the record in this case, however, will disclose that there is no evidence which can support the trial court's Judgment. On the contrary the Findings of Fact are the only tenable findings consistent with the evidence.

Conclusion.

In conclusion we submit:

(1) That the evidence introduced at the trial establishes the fact that the rail carriers were not negligent in handling cross-appellee's merchandise;

(2) That cross-appellee did not affirmatively prove the rail carriers negligent;

(3) That the Findings of Fact and Conclusions of Law reflect the above and are, therefore, inconsistent with the Judgment rendered for cross-appellee.

We therefore request this court to reverse the trial court's Judgment and enter Judgment in this court for cross-appellant or in the alternative to instruct the trial court to enter Judgment for cross-appellant. (*Allen v. St. Louis National Bank, supra; Massachusetts Bonding & Insurance Co. v. Santee,* 62 F. 2d 724; *Jensma v. Sunlife Assurance Co., supra;* 28 U. S. C. A. 875.)

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellee and Cross-Appellant.